

## **FINAL STATEMENT OF REASONS:**

The Initial Statement of Reasons is incorporated by reference.

The California Department of Corrections and Rehabilitation (CDCR or the Department) proposes to amend Sections 3173.2 and 3174 of the California Code of Regulations (CCR), Title 15, Subchapter 2, Article 7 and adopt new Subsection 3173.2(d) within the same article. This rulemaking action will provide regulatory authority to carry out security screening functions within the institutions more effectively.

## **UPDATES TO THE INITIAL STATEMENT OF REASONS**

The Notice of proposed Regulations was published on October 5, 2012. The Notice of Change to Regulations was mailed the same day in addition to being posted on the CDCR Internet and Intranet websites. The public hearing was held November 28, 2012. No one provided oral comments at the public hearing. During the 45-day comment period, five written comments were received. These comments are included below under the heading, “*Summaries and Responses to Written Public Comments.*” During a review of these comments, the Department recognized the need to provide additional clarification to the proposed regulations. These changes and reasons for them are found below under the heading “*Changes to the Text of Proposed Regulations (15-Day Renotice).*”

A 15-Day Renotice was distributed on February 8, 2013, to the five commenters who responded during the initial 45-day comment period. The 15-Day Renotice was also posted to CDCR’s Intranet and Internet websites with an effective comment period of February 8, 2013 – February 26, 2013. The amendments to the originally proposed text were added to clarify when an unclothed body search may be conducted and also punctuation was added for clarification. No one provided comments during the 15-day renotice period.

## **DETERMINATION**

The Department has determined that no alternative considered would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulations or and would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

## **ASSESSMENTS, MANDATES, AND FISCAL IMPACT**

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons.

It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of State prisons; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561. The Department has made an initial determination the proposed action will have no significant effect on housing costs. This action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The Department has determined that no reasonable alternatives to the regulation have been identified or brought to the attention of the Department. Additionally, there has been no testimony or other evidence provided that would alter the Department's determination.

### **CHANGES TO THE TEXT OF PROPOSED REGULATIONS (15-DAY RENOTICE)**

**New Subsection 3173(d) is adopted** as reflected in the Initial Statement of Reasons with the following updates to text:

**(d)(2)** The text, "Subject to subsection 3173.2(a)" is added for clarity.

**(d)(7)** The additional text, "This procedure may be conducted with the visitor's consent when there is a reasonable suspicion that the visitor is carrying contraband and when no less intrusive means are available to conduct the search" is added to replace deleted text "this procedure shall be used to resolve alarms set off during inspection by metal detector that could not be resolved using the clothed body search" to clarify for staff and visitors when a unclothed body search may be conducted.

### **Specific Purpose and Rationale for each Section, per government Code 11346.2(b)(1):**

#### **PUBLIC HEARING COMMENTS:**

**A public hearing was held on November 28, 2012, at 9:00 a.m.**

No comments were received at the hearing.

#### **SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:**

##### **Commenter #1**

**Comment 1A:** Commenter has never seen/heard such lackadaisical searches and security in their entire life and states that this is not the prison atmosphere they had in their mind as a public citizen. Commenter states commenter does not believe it is the custody staffs' fault rules are lax and believes it is a weak system that allows this criminal atmosphere to thrive. Commenter's opinions is that the fact that these criminals are still getting drugs and committing crimes behind prison walls is one of the greatest injustices to our society, their victims, and ultimately the inmate.

**Accommodation:** None

**Response 1A:** Although the above comment does address an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to GC Section 11346.9(a)(3), it is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

**Comment 1B:** Commenter's opinion is that these new search guidelines should at the very least include drug sniffing dogs be stationed at all entrances to the prison and would be one of the greatest deterrents for anyone entering grounds with drugs. Commenter is dumbfounded as to why this extremely simple solution has not been implemented and states the savings to humanity in preventing contraband in prisons is priceless, all the money saved by the state in these efforts is immeasurable.

**Accommodation:** None

**Response 1B:** See Commenter 1, Response 1A.

**Commenter #2**

**Comment 2A:** Commenter objects to the provision allowing prison guards to randomly select individuals for additional screening, including unclothed body searches.

**Accommodation:** Partial Accommodation. Amend subsection 3172.2(d)(2) to reference subsection 3173.2(a).

**Response 2A:** CCR Title 15, Section 3173.2. (a) states “Any person coming onto the property of an institution/facility shall be subject to inspection as necessary to ensure institution/facility security including prevention of the introduction of contraband. Inspections may include a search of the visitor’s person, personal property and vehicle(s) when there is reasonable suspicion to believe the visitor is attempting to introduce or remove contraband or unauthorized items or substances into, or out of, the institution/facility.” Failure to pass the metal detector inspection establishes reasonable suspicion. Additional screening, including an unclothed body search if necessary, may resolve alarms set off during inspection by metal detectors that could not be resolved using the clothed body search. Subsection 3172.2(d)(2) is amended to clarify that the reasonable suspicion standard, as set out in subsection 3173.2(a), applies to additional screening.

**Comment 2B:** Commenter states the policy that CDCR is implementing has nothing to do with the concerns that have arisen in California, but rather from problems that arose in Oregon and that their policy, designed to address problems that occurred/or were occurring in Oregon. Commenter states there is no evidence that these problems (bringing phones inside) is happening through California prison visiting rooms.

**Accommodation:** None

**Response 2B:** Cell phones in institutions/facilities are not only a problem for the CDCR. Other states and the federal government also have laws forbidding the possession of cell phones in prisons. These regulations emulate Oregon Department of Corrections (ODOC) regulations as in effect 2010 because they address a similar problem as exists in California, are well-thought out, comprehensive, and legally defensible. The ODOC, like the CDCR, is under the Ninth Circuit Court of Appeals, meaning they are under the same legal scrutiny as the CDCR.

**Comment 2C:** Commenter states that while subsection 3173.2(d)(7) states that the unclothed body search will occur if the problem could not be resolved through the clothed body search or detector, subsection 3173.2(d)(2) allows this type of screening if “an individual is selected for additional screening.” Commenter states this seems highly unconstitutional and vague as there is no criteria to guide prison officials as to how a person is going to be selected for additional screening and asks what standards are they going to use. Commenter states that such unfettered discretion is bound to open up the door to countless abuses and perversion (sic).

**Accommodation:** Partial Accommodation. Amend subsection 3172.2(d)(2) to reference subsection 3173.2(a) and Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 2C:** Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search. **Also see Commenter 2, Response 2A.**

**Comment 2D:** Commenter offers the following example: Say an officer does not like a particular inmate, which is common in prison, or say an officer is mad at an inmate for filing a 602, this new rule will now allow the officer to retaliate against the inmate by targeting his mother, father, sister, brother, children, wife, girlfriend, etc, and having them undergo a degrading strip search every time they visit their loved one and also adds that this will not promote families ties etc. If anything it will brake them, given no family member will want to visit. Commenter states that with all do (sic) respect, these visitors are free citizens, they should be treated with the respect and dignity they deserve.

**Accommodation:** Partial Accommodation. Amend subsection 3172.2(d)(2) to reference subsection 3173.2(a) and amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 2D:** Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search. **Also see Commenter 2, Response 2A.**

**Comment 2E:** Commenter offers another example: Say you have an officer who thinks a visitor is attractive, under this policy he can easily “select that individual for an unclothed search” just to get a “peek on.” Commenter states the last part may be exaggerated, but it could happen. Commenter states that every year guards throughout the State are sued for sexual misconduct toward female inmates. If such misconduct is committed against inmates, what’s to say it won’t happen to their families.

**Accommodation:** Partial Accommodation. Amend subsection 3172.2(d)(2) to reference subsection 3173.2(a) and amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 2E:** Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search. **Also see Commenter 2, Response 2A.**

**Comment 2F:** Commenter states the provision for allowing prison officials to “select individuals for additional screening” should not be allowed to go into effect and states the CDCR is starting to treat inmates’ families like criminals.

**Accommodation:** Partial Accommodation. Amend subsection 3172.2(d)(2) to reference subsection 3173.2(a) and amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 2F:** Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search. **Also see Commenter 2, Response 2A.**

### **Commenter #3**

**Comment 3A:** Commenter states the new visitor screening policy is total B.S., because unless you make all “correctional” staff and free staff go through the same screening process you’re wasting money for these machines because they are bringing in 80% of the dope, phones, weapons, etc.

**Accommodation:** None

**Response 3A:** These regulations are necessary to help prevent the introduction of contraband, unauthorized items, or substances into the institution/facility for the safety and well being of visitors, inmates, and staff. While these regulations may not address every possible method by which contraband is brought into the institutions, they are directed at addressing at least one known method.

**Comment 3B:** Commenter states this policy is just another way to abuse families and friends of inmates-nothing more than abuse of power. Commenter asks if commenter has to remind CDCR that a sizeable portion of “correctional” officers are racist, gang bangers, i.e., Crip, Blood, North and South Latinos, and white racist (skin heads & Neo Nazis). Commenter states all these folks need is a high school diploma. Commenter also states “your criminal ‘just-us’ system has long been infiltrated with criminals watching other criminals, so stop wasting public funds on such nonsense.”

**Accommodation:** None

**Response 3B:** It is the intention of the Department to provide a safe and secure environment for inmates, visitors, and staff. **Also see Commenter 3, Response 3A.**

#### **Commenter #4**

**Comment 4A:** Commenter states these sections for unclothed body search should be stricken and is upset with this proposed regulation. The institution the commenter is at is the farthest for inmates, especially if family has to drive more than five hours to visit. Commenter is appalled by these subsections and totally agrees that institutions must use every available resource for security purpose, but unclothed body searches are demoralizing and truly offensive. People opt to travel by car to prevent physical body (clothed) searches at airports. Commenter states now CDCR wants to stipulate regulations that Oregon DOC implements and asks, are you serious? Commenter states CDCR should apply for Oregon’s DOC if CDCR wants to conduct unclothed body searches.

**Accommodation:** Partial Accommodation. Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 4A:** An unclothed body search is a procedure aimed at resolving alarms set off during inspection by metal detectors that could not be resolved using the hand-held wand inspection or a clothed body search. This security measure is voluntary for visitors who were unsuccessful during the metal detector inspection before entering institutions/facilities. Subsection 3173.2(d)(7) is amended to clarify that an unclothed body search may be conducted with the visitor’s consent when there is a reasonable suspicion that the visitor is carrying contraband and when no less intrusive means are available to conduct the search. The visitor has the option to refuse an unclothed body search but will not be permitted to visit on that day.

The commenter opinion in regards to Oregon’s DOC is either generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

**Comment 4B:** Commenter gives the following example: Commenter is validated which means commenter is housed in SHU, (Security Housing Unit) a different facility than regular (GP) General Population housing. Commenter get visits, but these visits are non-contact meaning behind glass. These visits range from one to one a half hour long depending on C/Os (Correctional Officers). Commenter states commenter’s 60 year old grandma has to travel from Sacramento, or sister with her two small children from Salinas, fail the metal detector or detector being faulty for whatever reason,

and then have a stranger (C/Os) ask for unclothed body search (skin) even if by the same gender, is totally demoralizing, traumatizing, and if commenter's family felt offended, would stop/cancel visit with commenter and family ties, connections would just diminish.

**Accommodation:** None

**Response 4B:** It is not the intention of the Department to discourage family visiting, but to provide a safe environment for visitors, inmates, and staff. **See Commenter #4, Response 4A.**

**Comment 4C:** Commenter states that for commenter's family to drive for more than five hours to have to get unclothed body searches all for a non-contact visit is just wild and blatant and commenter might as well forget about visits. Commenter doesn't want family to get an unclothed body search because of a faulty metal detector or a correctional officer that is spiteful at visitors or has bitterness towards (inmate/inmate families).

**Accommodation:** None

**Response 4C:** The Department's intent is to provide a safe environment for the visitor, inmate, and staff that will encourage family visiting. **Also see Commenter #4, Response 4A.**

**Comment 4D:** Commenter asks what if a visitor has a piercing (body jewelry) in an area near the genitals and that piercing is un-removable or is still healing, are they to get their visit denied because they won't submit to an unclothed body search? Commenter states this is preposterous at its finest and disagrees with the proposed new subsection.

**Accommodation:** Partial Accommodation. Amend subsection 3172.2(d)(2) to reference subsection 3173.2(a).

**Response 4D:** Commenter 2, Response 2A.

## **Commenter #5**

**Comment 5A:** Commenter states the proposed Section 3173.2 is unlawful because it gives prison officials unfettered discretion to search prison visitors' naked bodies in violation of the fourth Amendment to the U.S. Constitution.

**Accommodation:** Partial Accommodation. Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 5A:** An unclothed body search is a procedure aimed at resolving alarms set off during inspection by metal detectors that could not be resolved using the hand held wand inspection or a clothed body search. This security measure is voluntary for visitors who were unsuccessful during the metal detector inspection but who wish to enter CDCR institutions/facilities. Subsection 3173.2(d)(7) is amended to clarify that an unclothed body search may be conducted with the visitor's consent when there is reasonable suspicion that the visitor is carrying contraband and when no less intrusive means are available to conduct the search.

**Comment 5B:** Commenter states the vague definition of "Unclothed body search" proposed in Section 3173.2(d)(7) permits prison officials to conduct visual body cavity searches, which may include visitors to bend over while prison officials visually inspect their naked anuses and crotch areas.

Commenter states visual body cavity searches are; “[a] severe if not gross interference with a person’s privacy” and “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.” *Blackburn v. Snow*, 771 F.2d 556, 564 (1<sup>st</sup> Cir. 1985). Commenter states regulations must be modified to require prison staff to show reasonable suspicion that visitors are carrying contraband before they are permitted to conduct any type of unclothed body searches.

**Accommodation:** Partial Accommodation. Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 5B:** When there is reasonable suspicion that the visitor is carrying contraband and there is no less intrusive means available to conduct the search, with the visitor’s consent, an unclothed body search may be conducted for the safety of visitors, inmates, and staff. **Also see Commenter #4, Response 4A.**

**Comment 5C:** Commenter states proposed Section 3173.2(d)(2)(C) allows prison officials to strip search for any reason and it provides “additional screening will occur when an individual sets off the alarm of the metal detector or an individual is selected for additional screening” therefore, the proposed regulation violates the Fourth Amendment because it does not require prison staff to establish reasonable suspicion that prison visitors may be carrying contraband by subjecting them to Strip Searches. Commenter cites *Burgess v. Lowery*, 201 F.3d 942, 945 (7<sup>th</sup> Cir. 2000).

**Accommodation:** Partial Accommodation. Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 5C:** See Commenter 4, Response 4A.

**Comment 5D:** Commenter states that to lawfully conduct an unclothed body search, staff must have reasonable suspicion that the visitor is carrying contraband and cites *Roark*, 48 Cal. App. 4<sup>th</sup> 1946, 1955 (1996); *Burgess*, 201 F.3d at 945 (7<sup>th</sup> Cir. 2000); and *Daugherty v. Campbell* 935 F.2d 780, 787 (6<sup>th</sup> Cir. 1991). Commenter states that unspecified suspicions fall short of providing reasonable ground to suspect that a visitor will attempt to smuggle drugs or other contraband into prison and cites *Hunter v. Auger*, 672 F.2d 668, 674 (8<sup>th</sup> Cir. 1982).

**Accommodation:** Partial Accommodation. Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 5D:** See Commenter 4, Response 4A.

**Comment 5E:** Commenter states that in contrast, under the proposed regulations in Section 3173.2(d)(2) correctional officers are not required to point to any objective facts indicating visitors are smuggling contraband before they are permitted to conduct unclothed body search. Commenter states this section must be modified to require staff to establish reasonable suspicion a visitor is smuggling contraband before conducting unclothed body searches.

**Accommodation:** Partial Accommodation. Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 5E:** See Commenter 4, Response 4A

**Comment 5F:** Commenter states proposed sections 3173.2(d)(7) does not define when prison officials are required to strip search and will lead to unconstitutional strip searches because it fails to clearly define how an alarm must be “resolved” before a strip search is required. Commenter also states that it allows prison staff to conduct strip searches without first exhausting all less intrusive methods, including hand-held wands, or establishing reasonable suspicion that a visitor is carrying contraband.

**Accommodation:** Partial Accommodation. Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 5F:** See Commenter 4, Response 4A.

**Comment 5G:** Commenter states that section 3173.2(d)(7) must be modified to clarify that unclothed body searches shall be conducted only after all of the following occur:

- The visitor sets off the alarm of the walk through metal detector.
- The visitor sets off the alarm during a hand held wand inspection.
- A clothed body search fails to reveal why the metal detector and hand held wand alarms were set off.
- Prison officials point to specific objective facts, in addition to the metal detector and held wand alarms which constitute reasonable suspicion to believe the visitor is smuggling contraband.
- The visitor consents to an unclothed body search after being informed that he/she has the option of leaving the institution and appealing the decision to conduct an unclothed body search.

**Accommodation:** Partial Accommodation. Amend subsection 3173.2(d)(7) to clarify the standards for an unclothed body search.

**Response 5G:** See Commenter 4, Response 4A

#### **SUPPLEMENTAL EXPLANATION TO ECONOMIC IMPACT ASSESSMENT:**

As discussed in the effects of these proposed regulations in the ISOR, these regulations are designed and intended to improve and clarify the visitor screening procedures to prevent the introduction of contraband in California State institutions/facilities. These regulations are directed at the internal management of State prisons and do not impose any obligations, duties, fees, costs, responsibilities, reporting requirements, etc. on California businesses, large or small. While members of the public and California residents may be subject to the screening procedures if they choose to visit a prison facility, the Department is unaware of any economic effects they would incur in complying with the regulations and believes that any such effects would be tenuous and/or speculative. No economic impacts have been brought to the attention of the Department. The Department has therefore concluded that these regulations will have no impact on the creation of new, or the elimination of existing jobs or businesses within California, or affect the expansion of businesses currently doing business in California. Regarding benefits, these regulations will protect the health and safety of California residents, worker safety, and the State’s environment by providing a safe environment that will encourage visitation for families, which will have a positive impact on inmates, and increase worker safety.

To clarify the inconsistency in the Economic Impact Assessment, the statement that stated the regulations will have no impact on the health and welfare of California residents, worker safety, or the State’s environment was in error as these regulations will, in fact, protect the health and welfare of California Residents, worker safety, and the State’s environment.